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Supreme Court, U.S.
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No. 01-1486

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

BEVERLY B. MANN,

*Petitioner,*

v.

THE UPJOHN COMPANY,

*Respondent.*

On Petition For Writ of Certiorari
To The Illinois Appellate Court, First District

# PETITIONER'S REPLY TO BRIEF OF RESPONDENT THE UPJOHN COMPANY IN OPPOSITION

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735 ILCS § 5/2-1301(e)

## ADDENDUM REGARDING ONE OF UPJOHN'S MISREPRESENTATIONS

Throughout her Reply to Upjohn's Brief in Opposition, Mann discusses a preeminent repeated tactic that the appellate court in its opinion, and Upjohn in its Brief in Opposition, employ: They cite a neutral but irrelevant fact in order to imply a particular non-neutral but false fact. The reader will presume that the cited fact is relevant and thus infer the intended non-neutral meaning because, absent the non-neutral meaning, the conclusion that supposedly follows from the stated fact actually would be a *non sequitur* to it. The appellate court used some accurate and some inaccurate neutral facts in this manner. Upjohn, on the other hand, used only accurate neutral facts to this end.

At p. 10 of her Reply, Mann notes Upjohn's reference at p. 5 to her impromptu motion to vacate the order of dismissal for want of prosecution a few minutes after that order was entered. Upjohn said Mann's reason was that she "realized" a few minutes after the order was entered dismissing the case for want of prosecution that "she might be liable for Upjohn's costs if the case were indeed dismissed for want of prosecution." But, as Mann said in her Reply, she had "realized" this because Upjohn's counsel, Stephen Scheve, without prior notice to Mann moved orally for costs, rattling off a citation to some procedural statute that Mann was unfamiliar with.

Upon reading that portion of Upjohn's brief, Mann was perplexed about Upjohn's purpose in citing that incident. Although Mann indeed had moved to vacate the order of dismissal five minutes after it was entered, and although, as Upjohn says, the judge refused to "rule on a motion to vacate a DWP I entered five minutes ago," *that was not the motion to vacate the DWP that was at issue on appeal.*

The judge, as unfamiliar as was Mann with the obscure statute Mr. Scheve had cited regarding costs, called a recess in order to retire to chambers and read the statute. Mann used that recess (of roughly ten minutes) to handwrite a two- or three-paragraph motion to vacate the dismissal order and to handwrite a copy of it to hand to Mr. Scheve. When the hearing resumed, Mann presented the handwritten motion. Upjohn accurately states the judge's response to it.

After the hearing ended, Mann filed her handwritten motion with the court clerk's office, so that motion is a part of the court record. But a few days later, she also filed a very lengthy (more than 20 pages, if she recalls correctly) amended motion to vacate the dismissal order pursuant to 735 ILCS § 5/2-1301(e). The motion recited the series of the events that lead her to request the dismissal for want of prosecution. It also noted, as Mann had orally earlier, that because there was a routine lag time of three or four months for trial date continuances, due to the backlog of cases scheduled for trial, Mann's case would then simply be placed into the trial-date queue and assigned a trial date three or four months hence. This would enable her to retain trial counsel and try the case.

So why did Upjohn cite Mann's handwritten motion to vacate the dismissal, and the narrow reason she stated in that motion, yet fail to mention the amended motion that she filed a few days later? Well, Mann thought when she drafted her Reply that Upjohn's purpose was to suggest that she was acknowledging fault by her "[realization] that she might be liable for Upjohn's costs if the case were indeed dismissed for want of prosecution."

But Mann now realizes that Upjohn's main purpose was to imply, falsely, that all that was at issue in Mann's appeal from the denial of her § 5/2-1301(e) motion was the denial of that impromptu motion. That's why the sentence in Upjohn's Reply immediately following the recitation of that incident reads, "On appeal, the Illinois Court of Appeals held that the

circuit court did not abuse its discretion in denying petitioner's motions to vacate the dismissal for want of prosecution."

The appellate court pretended that all that was at issue in the appeal itself was the denial of Mann's § 5/2-1301(e) motion – not the earlier-entered summary judgments, not the denials of Mann's trial-date-continuance motions and the stated policy grounds upon which those motions were denied, not anything except the denial of the § 5/2-1301(e) motion. Upjohn in turn takes this deceit a step further, by suggesting to this Court not only that the denial of the § 5/2-1301(e) motion was all that was at issue in the appeal but that Mann's spontaneous initial § 5/2-1301(e) motion (presented in the circumstances described above) was the sum and substance of the § 5/2-1301(e) motion at issue on appeal.

Mann supposes that she should have recognized this upon her first reading of Upjohn's brief, and given her lengthy experience in fielding exactly this type of thing in this litigation she wonders why she did not. This epiphany occurred to her on May 24, while she was driving her car. She pulled to the side of the road, phoned this Court's clerk's office and spoke with a supervisory clerk (she thinks, but is not sure, it was Francis Lorson). She asked whether she could file a motion to strike the Brief in Opposition on the basis that it misrepresented which orders she had appealed from in the lower appellate court; she explained that she already had filed her reply to the brief and had identified several of the misrepresentations but now realized that there was another significant one. She was advised to file a supplement to her Reply instead.

Respectfully submitted,
Beverly Mann